No. 77-1493

In the Supreme Court of the United States

OCTOBER TERM, 1978

GLADSTONE, REALTORS,® et al.,
Petitioners,

vs.

VILLAGE OF BELLWOOD, et al.,
Respondents.

ROBERT A. HINTZE, REALTORS,® et al.,
Petitioners,

vs.

VILLAGE OF BELLWOOD, et al.,
Respondents.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

I.

PLAINTIFFS HAVE FAILED TO STATE A CLAIM UNDER SECTIONS 3604 AND 3612 OF THE FAIR HOUSING ACT.

In sworn admissions, the individual plaintiffs have stated that they never intended to purchase or rent housing in the Village of Bellwood during the period relevant to this lawsuit. *Appendix* 28, 32, 117, 121. Because the individual plaintiffs had no interest in entering the housing market, they could not have been discriminated against in the purchase or rental of housing. Plaintiffs contend, nonetheless, that they have suffered an injury cognizable under Sections 3604 and 3612 in that their interests have been adversely affected through housing discrimination that was allegedly practiced against absent and unidentified non-parties.[1] The

[1] The *Gladstone* plaintiffs alleged that defendants "undertook efforts to influence the choice of prospective homebuyers on the basis of race, and discouraged prospective black homebuyers from purchasing homes in white areas on the basis of race." *Appendix* 5. Likewise, the *Hintze* plaintiffs alleged that defendants "undertook efforts to influence the choice of prospective black homebuyers from purchasing homes in white areas on the basis of race." *Id.*, 98. Although the individual plaintiffs initially alleged that they had been "denied their right to select housing without regard to race" (*Id.*, 6, 99), they later admitted that they were not "prospective homebuyers" because they never intended to purchase or rent a home in Bellwood during the relevant period. *Id.* 28, 32, 117, 121. The Seventh Circuit properly held that plaintiffs' allegations were foreclosed by these admissions (*Id.*, 153), and plaintiffs did not cross-petition for certiorari. The Lawyers' Committee now argues, however, that the Seventh Circuit erred because the individual plaintiffs might have developed an intention to purchase a home if they had been shown housing which was "sufficiently attractive to them."

(footnote continued)

central question presented herein is whether these plaintiffs—who have admitted that they never intended to enter the housing market—are entitled to maintain an action, under Section 3612, on the strength of their assertion that defendants discriminated against absent and unknown persons who may have been actual homeseekers.[2]

Even assuming that defendants did engage in racial steering of actual homeseekers, and that plaintiffs did suffer the injuries alleged in their complaints, Sections 3604 and 3612 would not protect the generalized interests which plaintiffs have asserted. Plaintiffs attempt to avoid that fact by asserting that they are within the broad "zone of interests" protected by the Fair Housing Act, but that principle cannot enlarge the explicit statutory right of action contained in Section 3612. Moreover, Sections 3610

(footnote continued)

Brief For Lawyers' Committee 17. In addition to being untimely, the Lawyers' Committee's argument is simply too speculative, and it ignores the uncontroverted fact that the individual plaintiffs were simply testers, who had no interest in purchasing or renting a home. Plaintiffs' claim must stand or fall with their allegations that they have been injured through defendants' alleged discrimination against absent and unknown persons who may have been actual homeseekers. The fragility of plaintiffs' position is underscored by the fact that they would not be qualified to represent these absent and unidentified homeseekers in a class action inasmuch as they could not be considered members of the class they purport to represent. See *Sosna* v. *Iowa*, 419 U.S. 393, 403 (1975). Moreover, plaintiffs have brought this action under Section 3612, and they cannot avail themselves of the broad standing granted by Section 3610 to any "person aggrieved," which has traditionally been construed to permit persons to assert the rights of others as private attorneys general. See pp. 15-16, *infra*; *Brief For Petitioners* 24-27.

[2] The Village of Bellwood is not a proper plaintiff herein because it is not a "private person" within the meaning of Section 3612. See *Brief For Petitioners* 17-18 n. 3. The Court of Appeals considered and rejected defendants' argument on this issue, which is part of the question presented for review and properly before the Court.

and 3612 do not grant rights of action to identical classes of potential litigants and, therefore, it does not follow that potential plaintiffs must be entitled to sue under Section 3612 simply because their alleged injuries might permit them to bring suit as "persons aggrieved" under Section 3610. Finally, the creation of a right of action in these plaintiffs is not warranted by either the legislative history of the Fair Housing Act or this Court's decision in *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972).

A. Whether Plaintiffs Are Within The "Zone Of Interests" Protected By The Fair Housing Act Is Irrelevant To The Question Whether They Have A Right Of Action Under Sections 3604 And 3612.

Relying on *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970), plaintiffs argue at length that their claims are cognizable under Section 3612 because the injury they allege is within the "zone of interests" protected by the Fair Housing Act. *Brief For Respondents* 17-25. The Court's decision in *Data Processing* is inapposite, however, because it considered the question of standing to secure judicial review of administrative action in circumstances where the relevant statute did not explicitly provide a right of action to anyone. In those circumstances, the Court held only that the plaintiffs' allegations of competitive injury, which allegedly resulted from a ruling of the Comptroller of the Currency, were sufficient to invest them with standing as "persons aggrieved" under the Administrative Procedure Act.[3]

[3]The Administrative Procedure Act permits administrative review actions to be brought by any "person aggrieved." 5 U.S.C. § 702. As the Court noted in *Data Processing*, a wide range of interests is encompassed by that language, which demonstrates a very broad grant of standing. See *Data Processing*, *supra*, 153-4.

By contrast, the presence of specific enforcement provisions in the Fair Housing Act precludes the use of a zone of interests analysis. Whether a particular claim falls within the protection of the Act must be determined by reference to those specific provisions. It proves too much to assert that the interests of the plaintiffs herein must fall within the zone of interests relevant to the Fair Housing Act simply because Congress acted to provide "for fair housing throughout the United States." 42 U.S.C. § 3601. The mere inclusion of a general statement of intention cannot create an actionable claim in circumstances which are not countenanced by the specific enforcement provisions contained in the Act. See *Bissette* v. *Colonial Mortgage Corp.*, 477 F.2d 1245, 1246 n.2 (D.C. Cir. 1973). Plaintiffs' reliance on this preamble is misplaced because its inclusion would have been equally appropriate if Congress had limited enforcement of the Fair Housing Act to suits brought by the Attorney General. In that event, it would certainly be absurd to suggest that any member of the public—even a direct victim of a discriminatory housing practice—could bring a private action simply because he alleged that his interest fell within the statutory zone of interests suggested by this preamble. Although the Fair Housing Act's enforcement procedures are in fact more complex than that suggested in this hypothetical, plaintiffs' assertion that a zone of interests analysis should displace a specific statutory remedial scheme is no more persuasive in this case.[4]

[4] Plaintiffs' reliance on a zone of interests analysis is similar to a claim of an implied right of action. Given the tripartite remedial scheme of the Fair Housing Act, however, any expansion of the Act's coverage through an implied right of action analysis would be

(footnote continued)

B. Sections 3610 And 3612 Are Not Merely Alternative Enforcement Provisions.

The Seventh Circuit erroneously held that Sections 3610 and 3612 provide wholly alternative enforcement procedures available to identical classes of plaintiffs, at their election, in all circumstances. In reaching that conclusion the Court of Appeals failed to consider the substantive differences between the two sections, and it did not evaluate "the role played by [Section 3612] within 'the context of the entire legislative scheme.'" *Morris* v. *Gressette*, 432 U.S. 491, 501 (1977), quoting *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 141 (1967).[5]

The most obvious difference between the two sections is their respective procedural schemes. See *Brief For Petitioners* 19-21. In Section 3610, Congress provided an exhaustion requirement to permit HUD, as well as specialized

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precluded by the principle of *expressio unius est exclusio alterius*. *National R.R. Passenger Corp.* v. *National Association of R.R. Passengers*, 414 U.S. 453, 458 (1974). Moreover, the other remedies provided by the Fair Housing Act, which are available to these plaintiffs, would make the implication of a right of action unnecessary to the achievement of the Act's purposes. Compare *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969).

[5] Under Section 5 of the Voting Rights Act of 1965, the Attorney General may object to changes in a state's voting laws. 42 U.S.C. § 1973c. Traditionally, the right to vote has been afforded special protection by the federal courts. See *Wayne* v. *Venable*, 260 Fed. 64, 66 (8th Cir. 1919). In *Morris*, *supra*, the Attorney General failed to object to a change in South Carolina's voting laws, and certain affected citizens sought review of that action under the Administrative Procedure Act. Despite the strong presumption in favor of judicial review of administrative action, and the important character of the rights which plaintiffs sought to secure *for themselves*, the Court held that the Attorney General's action was not reviewable.

state and local agencies, to utilize their expertise in resolving housing disputes. The Seventh Circuit's decision authorizes circumvention of this procedure by all potential plaintiffs in all cases, and the two reasons which plaintiffs put forward to support that decision are equally infirm.

First, plaintiffs argue that it would be "ridiculous" for Congress to require any class of plaintiffs to avail themselves of HUD conciliation mechanisms, as a condition precedent to filing a lawsuit, because HUD has no coercive powers of enforcement. *Brief For Respondents* 39. Plaintiffs' analysis is faulty, however, because the noncoercive nature of HUD's remedy only serves to underscore essential differences between Sections 3610 and 3612. The HUD remedy contained in Section 3610 is concededly less adversary than the Section 3612 judicial remedy, and it is less costly for both plaintiffs and defendants.[6] On the other hand, the relief available under Section 3610 may be less timely than that which might be granted by a federal injunction. As plaintiffs correctly note, "§ 3612 is vitally important in cases where time is of the essence." *Brief For Respondents* 37. Accord *TOPIC* v. *Circle Realty*, 532 F.2d 1273, 1276 (9th Cir.), *cert. denied*, 429 U.S. 859 (1976). Nonetheless, plaintiffs fail to perceive the importance of their observation. Generally, a direct victim of discrimination will need immediate relief to establish his right to particular housing before it is sold or rented to someone else. By contrast, there is no analogous need

[6] HUD conciliation procedures are flexibly designed to make legal representation unnecessary. For instance, a party need not be concerned that statements made by him in the context of conciliation proceedings will be used in subsequent litigation. See 42 U.S.C. §3610(a).

for alacrity in cases, such as this one, that are brought by persons who are not direct victims of alleged discrimination. Cases involving broad allegations by persons who are not direct victims of discrimination present the ideal circumstances for initial resort to administratve conciliation procedures, rather than coercive federal judicial remedies that are costly for society as well as for the parties. Moreover, conciliation may well lead to early termination of a controversy, with minimal costs, because HUD may successfully convince a putative defendant that settlement is indicated or, in other circumstances, it may convince the complaining party that his legal rights have not been violated.[7]

Because Section 3610 also defers to state and local fair housing laws creating rights and remedies substantially equivalent to those contained in the Fair Housing Act,[8]

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[7] Significantly, HUD is empowered to investigate complaints of housing discrimination, and to inform the Attorney General concerning the results of its investigation. 42 U.S.C. §§ 3610(a), 3611; 24 C.F.R. § 105.36. If HUD's investigation discloses evidence of a pattern or practice of discrimination, the Attorney General may bring an action under 42 U.S.C. § 3613. See *Hearings on H.R. 14765 Before the House Comm. on the Judiciary*, 89th Cong., 2d Sess. 1392-93 (1966) (remarks of HUD Secretary Weaver and HUD General Counsel Foard). Plaintiffs have alleged just such a pattern or practice of discrimination. See *id.*, 1209 (remarks of Attorney General Katzenbach).

[8] With remarkable ingenuousness, plaintiffs deprecate the remedies provided by the ordinance in effect in Bellwood. See *Brief For Respondents* 41. While defendants disagree with plaintiffs' construction of that ordinance, the Village is certainly free to enact a more stringent ordinance if it chooses to do so. It is indeed strange for the Village to be arguing that it needs the protection of the federal

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the noncoercive nature of HUD conciliation procedures is irrelevant wherever such state or local laws have been enacted. 42 U.S.C. § 3610(c). Finally, plaintiffs' persistent denigration of Section 3610 remedies ignores the fact that these remedies do not preclude federal judicial relief; they simply postpone the availability of that relief. As the Chief Justice has said in another context, "Exhaustion is simply one aspect of allocation of overtaxed judicial resources." *Moore* v. *City of East Cleveland*, 431 U.S. 494, 524 (1977) (Burger, C.J., dissenting). In short, Congress's failure to grant coercive enforcement authority to HUD does not weaken the policy considerations underlying the detailed remedial structure embodied in Section 3610. See *Brief For Petitioners* 20-21, 26-27.

Second, plaintiffs contend that Congress had no intention of deferring to state and local remedies in the enforcement of the Fair Housing Act. *Brief For Respondents* 39-41. That contention is wholly inconsistent with the requirement, contained in Section 3610, that remedies provided by state and local fair housing laws must be exhausted if they are substantially equivalent to those con-

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(footnote continued)

courts because it is dissatisfied with its own ordinance. Moreover, the efficacy of the Bellwood ordinance is irrelevant to defendants' principal argument: that Congress wished to encourage the enactment and enforcement of state and local fair housing laws creating rights and remedies substantially similar to those provided by the Fair Housing Act. See pp. 10-11 n. 10, *infra*. That purpose, rather than the specific ordinance involved in this case, must inform the Court's construction of Section 3612.

tained in the Fair Housing Act. 42 U.S.C. § 3610.[9] See *Brief For Petitioners* 20. Plaintiffs' argument—that Congress recognized that state and local governments could not be trusted—is flatly contradicted by the unambiguous provisions of Section 3610, as well as by its relevant legislative history.[10] Moreover, plaintiffs' argument proves noth-

[9] Plaintiffs incorrectly characterize defendant's position on this issue. Defendants have never suggested that exhaustion of state and local remedies is a prerequisite to the filing of a Section 3612 suit. See *Brief For Respondents* 39. Rather, defendants have argued that the explicit deference to effective state and local remedies required by Section 3610 reflects a strong Congressional policy encouraging the development and utilization of such remedies. *Brief For Petitioners* 20-21. The Seventh Circuit's expansive interpretation of Section 3612 allows systematic circumvention of the Section 3610 remedial structure, thereby frustrating this underlying policy.

[10] The provisions relating to state and local remedies originated in an amendment offered by Senator Miller. The following colloquy, between Senator Miller and Senator Hart, is particularly instructive with respect to the purpose of these provisions:

> [MR. MILLER.] It seems to me that if a State or local fair housing law provides substantially equivalent rights and remedies, if we are going to let the local agencies of government carry out their responsibilities, they should be given the opportunity to do so. That is why the first part of my amendment provides that if the appropriate State or local enforcement official has, within 30 days from the date the alleged offense has been brought to his attention, commenced proceedings in the matter, or, having done so, failed to carry forward such proceedings with reasonable promptness, then and only then can the Secretary enter the matter.
>
> * * * * *
>
> I wish to repeat that, if we are dealing with a State or local fair housing law which provides equivalent remedies, why do we not require the one who has allegedly been discriminated against

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ing but that plaintiffs do not agree with the policy judgments already made by Congress. Plaintiffs' bald assertion that local governments played a substantial part in creating and maintaining housing discrimination need only be compared to Senator Mondale's criticism of "the policies and practices of agencies of government at *all levels*" to demonstrate the superficiality of plaintiffs' argument. See 114 Cong. Rec. 2277 (1968), quoting U.S. Comm. on Civil Rights, Annual Report 60 (1967) (emphasis added).

The materially divergent language used in Sections 3610 and 3612, to identify the different classes of persons

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> to go through the remedies so provided?
>
> That is why I provide in the second part of my amendment that no civil action may be brought in any U.S. district court if the person aggrieved has a judicial remedy under a State or local fair housing law which provides substantially equivalent rights and remedies to this act.
>
> I believe it is a matter of letting the State and local courts have jurisdiction. We in the Senate know that our Federal district court calendars are crowded enough, without adding to that load if there is a good remedy under State law.
>
> Mr. President, that is what the amendment is all about. I have discussed it at some length with the manager of the bill and I understand it is acceptable to him.
>
> MR. HART. Mr. President, the Senator from Iowa, in making this suggestion, may very well have improved the bill. It certainly recognizes the desire all of us share that the State remedies, where adequate, be availed of and that unnecessary burdening litigation not further clog the court calendars.
>
> The Senator from Iowa in developing this approach has made the bill much more acceptable. The senior Senator from Illinois [Mr. Dirksen], whose substitute we are actually discussing, shares this opinion.
>
> I support the request of the Senator from Iowa that we agree to the amendment.
>
> 114 Cong.Rec. 4987 (1968)

entitled to relief thereunder, also underscores the substantive differences between the two sections. While Section 3610 promises relief to any "person aggrieved," Section 3612 provides merely that certain enumerated rights "may be enforced by civil actions." The importance of this distinction is well demonstrated by plaintiffs' posture in this case. As plaintiffs have emphasized, the gist of their complaint is that defendants have allegedly steered actual but unknown homeseekers. See *Brief For Respondents* 13. Assuming *arguendo* that defendants have engaged in that conduct, that defendants' conduct violates the Fair Housing Act, and that these plaintiffs have been injured because of that conduct,[11] it may be that the individual plaintiffs[12] would qualify as "persons aggrieved" within the meaning of Section 3610. It does not follow, however, that they are entitled to sue under Section 3612.

Unlike Section 3610, Section 3612 speaks of "rights" rather than of "injury." The notion of "injury" is more comprehensive than the concept of "rights" in that a person may be injured by unlawful conduct even when his legal rights have not been violated. For instance, a person may have been injured in fact by an illegal search, but he will not be entitled to have evidence suppressed unless his legal rights were also violated. See *Brief For Petitioners* 27-28.

[11] Plaintiffs' alleged injury is insufficient, however, to establish a justiciable controversy under Article III. *Brief For Petitioners* 39-52. See pp. 28-29, *infra*.

[12] If the Village of Bellwood is not a "person" within the meaning of the Fair Housing Act, 42 U.S.C. § 3602(d), it cannot be a "person aggrieved" under Section 3610. See *Brief For Petitioners* 17-18 n. 3. Certainly, the Village of Bellwood is not a "private person" within the protection of Section 3612. *Id.*

The Court has previously held that an action under Section 3612 "sounds basically in tort" [*Curtis* v. *Loether*, 415 U.S. 189, 195 (1974)], and it is well established that "an action for damages resulting from a tort can only be sustained by the person directly injured thereby, and not by one claiming to have suffered collateral or resulting injuries." *Loucks* v. *Albuquerque National Bank*, 418 P.2d 191, 199 (N. Mex. 1966). Accord *Ware* v. *Brown*, 29 Fed. Cas. 220 (S.D. Ohio 1869).[13] There is nothing in Section 3612, or in the legislative history of that section, to suggest that Congress intended to depart from this principle. Indeed, the extension by Congress of a right of action under

[13] Similarly, a person may not sue for breach of contract merely because he has been injured by the breach; he must also demonstrate that he was a party, or a third-party beneficiary, to the contract. A party who is only an incidental beneficiary may not maintain an action for breach because his "relation to the contracting parties is such that the courts will not recognize any legal right in him." 4 A. Corbin, *Contracts* § 779C (1951). In *Isbrandtsen* v. *Local 1291*, 204 F.2d 495 (3rd Cir. 1953), the court applied this principle in construing a federal statute strikingly similar to Section 3612. Isbrandtsen had chartered a vessel to Scott who, in turn, hired Lavino to unload its cargo. During the unloading, Lavino's employees struck in violation of their collective bargaining agreement. Isbrandtsen brought suit against the union, under 29 U.S.C. § 185(a), alleging that it had been injured through the delay caused by the illegal strike. In relevant part, Section 185(a) provides that, "Suits for violation of contracts between an employer and a labor organization . . . may be brought in any district court of the United States having jurisdiction of the parties." 29 U.S.C. § 185(a). Because Section 185(a) does not define the class of persons who are thereby entitled to sue, the court was required to determine whether a third-party such as Isbrandtsen should be "included as one who may sue for damages suffered by breach of this contract." *Isbrandtsen*, *supra*, 496. The court held that the statute did not provide a remedy to persons who were not parties to a collective bargaining agreement. *Id.*, 498.

Section 3610 to any person claiming injury—and its failure to employ the same expansive language in Section 3612—strongly suggest that Congress intended to adhere to traditional principles in Section 3612 cases.[14]

Plaintiffs assert repeatedly that they brought "*it*" action to protect "*their* right to maintain their present homes without regard to illegal racial considerations." *Brief For Respondents* 15 (emphasis in original). In this way, they attempt to transform the injury which they have allegedly suffered into a violation of rights protected by the statute.[15] One looks in vain, nonetheless, to find this "right" among those enumerated in Section 3604. Because plaintiffs cannot demonstrate a violation of rights guaranteed by Section 3604, and because the injuries they claim to have received are collateral to the alleged wrongful conduct, they have not stated a claim under Section 3612.

[14] By interpreting Sections 3610 and 3612 as co-extensive, the Seventh Circuit has invested putative plaintiffs with the power to decide whether legislative commitments to conciliation rather than litigation, and to the development of and deference to effective state and local remedies, should be furthered. The Seventh Circuit's decision has thereby encouraged emasculation of one part of the tripartite remedial scheme that was carefully designed to further those goals. The Fair Housing Act was "born of compromise," and it is necessary "to respect the limits up to which Congress was prepared to enact a particular policy, especially when [as here] the boundaries of a statute are drawn as a compromise resulting from the countervailing pressures of other policies." *United States* v. *Sisson*, 399 U.S. 267, 298 (1970). To permit these plaintiffs to abrogate systematically the policies underlying Section 3610, by suing immediately under Section 3612, is contrary to the principle that "[o]ne portion of a statute should not be construed to annul or destroy what has been clearly granted by another." *Peck* v. *Jenness*, 48 U.S. (7 How.) 612, 623 (1849). "[T]he construction should be such that both provisions, if possible, may stand." *United States* v. *Moore*, 95 U.S. 760, 763 (1877). The Seventh Circuit acknowledged that its decision "may to some degree seem to offend a judicial penchant for consistency." *Appendix* 162. The inconsistency acknowledged by the Seventh Circuit would be avoided, however, by giving a reasonable interpretation to each of the sections. If Section 3610 is liberally construed, consistent with its use of the "person aggrieved" standard, and if Section 3612 is construed consistently with its customary usage, to permit a tort action to be brought only by the person directly injured, the inconsistency will necessarily be avoided. See *Lamp Chimney Co.* v. *Brass & Copper Co.*, 91 U.S. 656, 663 (1875).

In contrast to Section 3612, Section 3610 applies to any "person aggrieved," expansively defined as "[a]ny person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur." 42 U.S.C. §3610(a). This section must be construed in light of the fact that the phrase "person aggrieved" is a term of art, which has been used historically to create an expansive right of access to the courts. See *Brief For Petitioners* 19-24.[16] As the Court has previously

[15] This "right-injury" distinction was immaterial in *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972), because the plaintiffs therein brought suit under Section 3610. They alleged that they had been injured by being deprived of the benefits of living in an integrated apartment complex and they qualified, therefore, as "persons aggrieved" under the more comprehensive provisions of Section 3610. The Court did not have to decide whether the "right" to live in an integrated community is a right granted by Section 3604.

[16] In *E.E.O.C.* v. *Bailey*, 563 F.2d 439, 452 (6th Cir. 1977), *cert. denied*, 435 U.S. 915 (1978), the court held that the inclusion of this phrase in Title VII demonstrated an intention to permit suits to be brought by persons "who may have suffered from the loss of benefits from the lack of association with racial minorities at work." The court emphasized that it would not have

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noted, "It is a well-settled rule of construction that language used in a statute which has a settled and well-known meaning, sanctioned oy judicial decision, is presumed to be used in that sense by the legislative body." *Kepner* v. *United States*, 195 U.S. 100, 124 (1904). Accord *The "Abbotsford,"* 98 U.S. 440, 444 (1878).

Plaintiffs herein have simply ignored the Court's holding in *Trafficante* that the phrase "person aggrieved" demonstrates "a congressional intention to define standing as broadly as is permitted by Article III of the Constitution." *Trafficante*, 409 U.S. at 209, quoting *Hackett* v. *McGuire Brothers, Inc.*, 445 F.2d 442, 446 (3rd Cir. 1971). Instead, plaintiffs rely on a statement made by Representative Cramer in 1966, during hearings on an earlier and unsuccessful housing bill which he opposed, for the dubious proposition that Congress actually intended to limit standing, two years later, by including "person aggrieved" in Section 3610. See *Brief For Respondents* 30. Plaintiffs' reliance on that statement is simply misplaced.

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reached this conclusion but for Congress's inclusion of the "person aggrieved" standard in that statute. *Id.* The Sixth Circuit's decision in *Bailey* followed the Ninth Circuit's decision in *Waters* v. *Heublein, Inc.*, 547 F.2d 466 (9th Cir. 1976), *cert. denied*, 433 U.S. 915 (1977), in which the court held that a white woman, who claimed to have been injured because her employer discriminated against others on racial grounds, was "a person claiming to be aggrieved" within the meaning of Title VII. Although the membership of the *Waters* panel contained one judge who had participated in the court's prior decision in *TOPIC* v. *Circle Realty*, 532 F.2d 1273 (9th Cir.), *cert. denied*, 429 U.S. 859 (1976), the later panel found no need to distinguish the earlier decision. When considered together, the Ninth Circuit's decisions in *Waters* and *TOPIC* strongly support defendants' construction of Sections 3610 and 3612.

Representative Cramer's statement was addressed to a predecessor bill that was substantially unlike the bill that was finally enacted, and it was made in the course of hearings[17] that took place two years before the passage of the Fair Housing Act. The congressman's statement also reflects a fundamental misunderstanding of both the customary meaning of "person aggrieved" and constitutional standing requirements. The major difficulty with plaintiffs' reliance on the Cramer statement, however, is that it fails to account for Section 3612 as part of an integrated and coherent statute. See *Brief For Petitioners* 19-29. The bill that Representative Cramer addressed in 1966 was materially different from the bill that was enacted in 1968 in that the earlier bill "provided for enforcement only by an action in a United States District Court or in an appropriate state court." *Brief For The United States* 23-24.

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[17] The total absence of committee reports, which are the most reliable source of legislative history, strongly supports the Court's observation that, "The legislative history of the Act is not too helpful." *Trafficante, supra*, 210. A committee report is persuasive evidence of legislative intent because it "represents the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation." *Zuber* v. *Allen*, 396 U.S. 168, 186 (1969). Congressional debates are generally considered to be less reliable. *United States* v. *U.A.W.*, 352 U.S. 567, 585 (1957). They are particularly unreliable when they reflect merely the views of individual members. *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443, 474 (1921). The isolated statement of Representative Cramer is entitled to little weight because it related to an earlier bill, and it was made in Committee, rather than in the House itself. "[S]uch individual expressions are without weight in the interpretation of a statute." *McCaughn* v. *Hershey Chocolate Co.*, 283 U.S. 488, 494 (1931). Statements of individual members are especially suspect when, as here, the individual member is an opponent of the legislation under consideration. "An unsuccessful minority cannot put words into the mouths of the majority and thus, indirectly, amend a bill." *Mastro Plastics Corp.* v. *N.L.R.B.*, 350 U.S. 270, 288 (1956) (footnote omitted).

In other words, the Cramer statement is not helpful in understanding the proper relationship of Sections 3610 and 3612—which is the central question presented herein—because the bill that was the subject of that statement had no provision that was analogous to Section 3610. Representative Cramer's statement lacks authority because the context in which it was made has been superseded.

C. Plaintiffs' Argument That They Were Direct Victims Of Discrimination, With Rights Cognizable Under Sections 3604 and 3612, Is Untimely And Unpersuasive.

The individual plaintiffs have alleged that defendants "denied [them] their right to select housing without regard to race." *Appendix* 6, 99. In formal admissions, however, plaintiffs stated that they never intended to purchase or rent homes in Bellwood during the relevant time period. *Id.*, 28, 32, 117, 121. Because of those admissions, the Seventh Circuit held that the district court had properly dismissed those claims. *Id.*, 153. Plaintiffs did not cross-petition for certiorari to bring that portion of the Seventh Circuit's holding before this Court, and it is not part of the question on which certiorari was granted. In their answering brief, nonetheless, plaintiffs seem to argue that they were direct victims of discrimination within the scope of Section 3604. *Brief For Respondents* 27-28.[18] The Lawyers' Committee argues that point

[18] Plaintiffs also argue that defendants' failure to respond to their discovery requests precluded them from uncovering possible examples of racial steering against actual homeseekers. See *Brief For Respondents* 14 n. 7. Had they felt it necessary, plaintiffs could have moved the district court to compel responses to their discovery requests, and they could have sought a continuance to obtain affidavits or discovery to oppose defendants' motions for summary judgment. Fed.R.Civ.P. 37(a)(2), 56(f). Because they chose not to do so, their present argument sounds hollow.

more explicitly. See *Brief For Lawyers' Committee* 11-18. These arguments are not properly before the Court because a respondent must cross-petition for certiorari if he is dissatisfied with any portion of the judgment below. *Strunk* v. *United States*, 412 U.S. 434, 437 (1973); *Brennan* v. *Arnheim & Neely, Inc.*, 410 U.S. 512, 516 (1973); *N.L.R.B.* v. *International Van Lines*, 409 U.S. 48, 52 n.4 (1972); *Alaska Industrial Board* v. *Chugach Electric Association*, 356 U.S. 320, 325 (1958). Because these arguments are beyond the scope of the question presented, they should not be considered by this Court. Cf. *Irvine* v. *California*, 347 U.S. 128, 129 (1954).

Even if plaintiffs' arguments were properly before the Court, which they are not, those arguments would not be persuasive on the merits because Section 3604 grants rights actionable under Section 3612 only to persons who are prospective purchasers or renters of housing. The first clause of Section 3604(a) explicitly limits the coverage of that subsection to circumstances in which a bona fide offer has been made. The bona fide offer requirement reflects Congress's intention to minimize harassment and abuse in the enforcement of the Fair Housing Act. See *Brief For Petitioners* 31-34. The title of Section 3604—"Discrimination in Sale or Rental of Housing"— also shows that Congress intended to limit to actual homeseekers the protection afforded by Section 3604. See *United States* v. *Fisher*, 6 U.S. (2 Cranch) 358, 359 (1805) (Marshall, C.J.).

For their part, plaintiffs emphasize the absence of any "bona fide offer" language in the remaining provisions of Section 3604, from which they infer that the protection of those provisions is not limited to persons who are actually interested in purchasing or renting a home. Plaintiffs'

inference is unsound, however, because it fails to recognize that the existence of a "bona fide offer" is logically relevant only to sale and rental situations, and not to the other activities that are covered by Section 3604. Clearly, it would not make sense to require the existence of a bona fide offer—or any offer—as a precondition for bringing a lawsuit to challenge discrimination occurring at the time of advertisement, negotiation, or inspection of housing. However, it would make equally little sense to permit someone who has no intention of purchasing or renting a home to shop for lawsuits by reading the classified advertisements in the daily newspaper. See *Hailes* v. *United Airlines*, 464 F.2d 1006, 1008 (5th Cir. 1972). In other words, even at the time of advertising, negotiation or inspection, a good faith interest in purchasing or renting a home is necessary to establish a violation of Section 3604. If the Lawyers' Committee is correct in its assertion that the Fair Housing Act creates a right of "nondiscriminatory access to the housing market" (*Brief For Lawyers' Committee* 15), the exercise of that right necessarily requires an intention to enter the housing market. Because plaintiffs herein lacked that intention, they could not have been discriminated against in the sale or rental of housing.[19]

[19] Previous decisions of this Court, permitting suits to be brought by persons motivated by a desire to institute litigation, are readily distinguishable from this case. In *Evers* v. *Dwyer*, 358 U.S. 202 (1958), the Court held that the plaintiff did not have to be arrested to establish an "actual controversy" within the meaning of the Declaratory Judgment Act. In *Pierson* v. *Ray*, 386 U.S. 547 (1967), the Court held simply that the plaintiffs' expectation of an illegal arrest did not constitute consent to that arrest. Neither case involved circumstances or a question of substantive law remotely similar to those presented herein.

Finally, the Lawyers' Committee suggests that the requirement of a good faith interest in entering the housing market will prove unworkable. *Brief For Lawyers' Committee* 17-18.[20] This argument is unpersuasive because courts must frequently determine issues of intent. See *Wood* v. *Strickland*, 420 U.S. 308 (1975). That some cases may present close factual questions is no justification for despairing of that inquiry. Moreover, whatever difficulties of proof may be encountered in other circumstances, no such uncertainty is present in this case because plaintiffs have unequivocally admitted that they did not intend to purchase or rent housing.[21]

[20] The Lawyers' Committee asserts that plaintiffs' "only admission was that they did not intend to make bona fide offers to purchase." *Brief For Lawyers' Committee* 8 n.6. This assertion is incorrect because plaintiffs admitted that they had no intention whatsoever of purchasing or renting a home. *Appendix* 28, 32, 117, 121. The Lawyers' Committee further characterizes the good faith intention requirement as having "little relationship to the purposes of the Act." *Brief For Lawyers' Committee* 17. This statement, of course, is inconsistent with the legislative policy exemplified in the Allott Amendment. See *Brief For Petitioners* 31-34. The Lawyers' Committee further asserts that defendants' discovery in this case "focused on the individual respondents' motivations rather than on the issue of discrimination." *Brief For Lawyers' Committee* 17. That statement is erroneous. In each of defendants' discovery requests, only one request for admission focused on plaintiffs' intentions; the remainder of the interrogatories, requests to produce, and requests for admissions concerned the question of actual discrimination. *Appendix* 14-22, 105-113.

[21] Moreover, it must be assumed that most defendants will propound questions to plaintiffs concerning their intentions, and that plaintiffs will truthfully answer such questions when required to do so under oath. The Lawyers' Committee's position is incomprehensible, however, unless one assumes the contrary.

D. The Legislative History Of The Fair Housing Act Does Not Support The Seventh Circuit's Decision.

The Seventh Circuit erred in relying upon the Fair Housing Act's legislative history to support its construction of Section 3612. *Appendix* 161-62. In this Court, plaintiffs' legislative history argument is essentially two-pronged. First, plaintiffs cite a House staff memorandum which described Section 3612 as "apparently an alternative to the conciliation-then-litigation approach." 114 Cong. Rec. 9612 (1968).[22] See *Brief For Respondents* 34. Defendants have previously noted that this characterization is only partially correct: Sections 3610 and 3612 are indeed alternatives for persons who have actually been subjected to discrimination in the purchase or rental of housing. Because the legislative history of the Act contains no indication at all that Congress ever considered the possibility that suits might be brought by persons who were not prospective purchasers or renters, however, the statement made in the House staff memorandum has little probative value in the present context. See *Brief For Petitioners* 29-30.

Plaintiffs' second legislative history argument is more general but equally unpersuasive. Plaintiffs assert that the legislative history contains nothing to suggest "that standing under § 3612 was designed to be narrower than standing under § 3610." *Brief For Respondents* 29. Plain-

[22] Plaintiffs' quotation from the House staff memorandum is questionable in that it omits the qualifying adverb "apparently." See *Brief For Respondents* 34. The memorandum itself is also suspect because it was prepared for the purpose of opposing the proposed legislation. Representative Ford inserted it in the Congressional Record to help convince his colleagues that the bill ought not to be hastily adopted after the murder of Dr. Martin Luther King. See 114 Cong. Rec. 9609 (1968). Consequently, the statement quoted by plaintiffs is entitled to little weight in the interpretation of Section 3612. See *Mastro Plastics Corp.* v. *N.L.R.B.*, 350 U.S. 270, 288 (1956).

tiffs conclude, therefore, that the class of potential plaintiffs under Section 3612 is at least as inclusive as that under Section 3610. This conclusion is unwarranted. Because Congress never considered the possibility that suits might be brought by persons other than direct victims of discrimination, Congress's failure to distinguish, in terms, between the classes protected by Sections 3610 and 3612 does not give weight to the Seventh Circuit's decision.

According to Senator Mondale, "the basic purpose" of the Fair Housing Act was "to permit people who have the ability to do so to buy any house offered to the public if they can afford to buy it." 114 Cong. Rec. 3421 (1968). Cf. *id.* 2277-78, 5514-15. Although the entire society suffers from the effects of discrimination in some sense, the legislative history of the Fair Housing Act contains no indication that Congress intended that persons other than those discriminated against should be allowed to bring suit to enforce the Act. Given this silence, Section 3612 "should be construed to fit, so far as will comport with its words, into the entire statutory system . . . to make a workable, consistent and equitable whole." *Feres* v. *United States*, 340 U.S. 135, 139 (1950).[23] The individual plaintiffs

[23] In *Feres, supra*, the Court held that the Federal Tort Claims Act did not afford a remedy to persons in the military service who had been injured by the negligence of other active duty military personnel. As here, the legislative history demonstrates that Congress had not considered the possibility that such claims might be made. The Court said:

> There are few guiding materials for our task of statutory construction. No committee reports or floor debates disclose what effect the statute was designed to have on the problem before us, or that it even was in mind. Under these circumstances, no conclusion can be above challenge, but if we misinterpret the Act, at least Congress possesses a ready remedy.

Id., 138.

rest their claim of injury upon discrimination that was allegedly practiced against absent and unidentified third-parties, who may have been direct victims of discrimination. If these plaintiffs wish to vindicate the rights of those third-parties, they must do so under Section 3610. Neither the legislative history nor the language of the Fair Housing Act supports plaintiffs' right to sue under Section 3612.[24]

E. This Court's Decision In Trafficante Does Not Control This Case.

In *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972), the Court held that residents of an apartment complex were entitled to sue as "persons aggrieved," under Section 3610 of the Fair Housing Act, because they alleged that they had been injured through defendants' interference with their interests in living in an integrated housing complex. Because the Court's holding in *Trafficante* was based on the broad "person aggrieved" language of Section 3610, rather than the narrower language of Section 3612, that decision does not control the present case.

Although the *Trafficante* plaintiffs initially brought their action under both Section 3610 and Section 3612, the latter played no part in this Court's decision. In *Trafficante*,

[24] As further support for the Seventh Circuit's decision, plaintiffs rely on that portion of the legislative history dealing with administrative remedies. *Brief For Respondents* 31-33. From a brief summary of the policies underlying the adoption of the administrative remedies provision, plaintiffs conclude that "Congress intended . . . that there would be no distinction between who might bring an action under the administrative procedure as compared to the judicial procedure." *Id.*, 32. That conclusion, defendants submit, is completely unwarranted because the statements of Representative Conyers, which plaintiffs quote in support of their conclusion, do not even address the issue. Here, as elsewhere, plaintiffs attempt to infer far too much from the silence of legislative history.

the Court noted that Section 3610 was "[t]he key section now before us." *Id.*, 210. Moreover, the Court rested its holding only on Section 3610, specifically noting that it was "leaving untouched all other questions." *Id.*, 212. There is simply no suggestion in *Trafficante* that the Court intended to endorse the Section 3612 claims of the plaintiffs therein, and that decision does not, in any way, depend on the recognition of those claims. Indeed, the Court could not have been more explicit in disavowing Section 3612 as a basis for its holding.[25] That *Trafficante* should be narrowly construed is also demonstrated by the concurring opinion of three Justices, which addressed only Section 3610—that provision "purporting to give all those who are authorized to complain to the agency the right also to sue in court"—and concluded that that provision should be sustained "insofar as it extends standing to those in the position of the petitioners in this case." *Id.*, 212 (White, J., concurring).

The Court's decision in *Trafficante* does not control this case because it did not decide whether Section 3612 grants any right of action to persons who are not direct victims of discrimination.[26] Moreover, the Seventh Circuit erred

[25] Even if the Court had been silent with respect to the Section 3612 claim, however, that silence would not support the position of the plaintiffs herein because an argument based on the Court's silence, with respect to an issue that is not essential to its holding, is inherently suspect. Even *sub silentio* treatment of an essential issue lacks the full weight of *stare decisis*. *Edelman* v. *Jordan*, 415 U.S. 651, 671 (1974). Cf. *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977).

[26] That the Court rested its decision on Section 3610, rather than on Section 3612, also supports defendants' position that Section 3610 grants a right of action to a broader class of plaintiffs than does Section 3612.

in holding that the decision it reached was required by the "thrust and rationale" of *Trafficante*. *Appendix* 160. The position taken by the Seventh Circuit is not necessary to guarantee that "complaints by private persons [will continue to be] the primary method of obtaining compliance with the Act." *Trafficante, supra,* 209. More significantly, given "the enormity of the task of assuring fair housing" (*id.,* 211), it is imperative that this Court construe Section 3612 consistently with the development and utilization of effective fair housing laws at all levels of government, as Congress intended when it enacted the Fair Housing Act. The Seventh Circuit's construction of Section 3612 undermines this important objective, and it is also unsupported by the language and legislative history of the Act.

II.

PLAINTIFFS HAVE FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED UNDER SECTION 1982.

Neither the individual plaintiffs nor the Village of Bellwood has stated a claim under Section 1982 because that section grants no right of action to plaintiffs who allege only "that they have been harmed indirectly by the exclusion of others." *Warth* v. *Seldin,* 422 U.S. 490, 514 (1975). Plaintiffs' contrary assertion is unsupported by any authority, and their reliance on *McDonald* v. *Santa Fe Trail Transportation Co.,* 427 U.S. 273 (1976), is misplaced. See *Brief For Respondents* 46. In *McDonald,* two white employees alleged that they had been subjected to racial discrimination because their employment was terminated when they were accused of theft, while a black fellow employee who was similarly accused was not discharged. The

Court held that the *McDonald* plaintiffs had stated a claim under Section 1981 because, unlike the plaintiffs herein, they were direct victims of racial discrimination. Consequently, the *McDonald* decision is not helpful in the present case. Plaintiffs' discussion of *Tillman* v. *Wheaton-Haven Recreation Association,* 410 U.S. 431 (1973), is also inapposite because the plaintiffs therein were also direct victims of racial discrimination, whose rights to purchase and hold real estate were violated.[27]

In effect, plaintiffs seek to have the provisions of Section 1982 declared co-extensive with those of the Fair Housing Act. The Court has previously held, however, that Section 1982 is narrower in its scope. *Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409, 413-14 (1968). Likewise, in *Hunter* v. *Erickson,* 393 U.S. 385, 388 (1969), the Court held that Section 1982 must be construed in light of the "far more detailed" provisions of the Fair Housing Act. It is obvious, therefore, that the provisions of Section 1982 and the Fair Housing Act are not co-extensive.

Plaintiffs allege that they were injured by defendants' discrimination against absent and unidentified third par-

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[27] In *Tillman, supra,* the value of the plaintiffs' property was diminished when they were denied membership rights, in a community swimming pool association, because of their race. If the *Tillman* plaintiffs had not been black, they would not have been denied membership in that association, and they would not have suffered any injury. The present case is not analogous because the plaintiffs herein allege only that they have been injured through discrimination that was directed against others. Moreover, the economic injuries alleged by the plaintiffs herein have nothing to do with their race. Stated most simply, the plaintiffs herein have not been denied the same right to hold real property "as is enjoyed by white citizens." 42 U.S.C. § 1982.

ties. Their Section 1982 claim must fail because they have not alleged that they personally suffered any injury cognizable under that section.

III.

PLAINTIFFS LACK STANDING TO SUE UNDER ARTICLE III OF THE UNITED STATES CONSTITUTION.

Plaintiffs have failed to satisfy the case or controversy requirement of Article III and thus they lack standing to bring this action, even if the Court should find that they have stated a claim under Section 1982 or Section 3612. The injury alleged by plaintiffs—denial of the benefits of living in an integrated society—is necessarily generalized; it is shared by the public at large, and it is insufficient to establish a concrete injury in fact. See *Brief For Petitioners* 42-46. In addition, plaintiffs' alleged injuries are causally related to the defendants' alleged conduct only in a very attenuated sense. See *id.*, 46-52. Finally, plaintiffs' stake in the outcome of the lawsuit is simply insufficient to "insure that exercise of the court's remedial powers is both necessary and sufficient to give [them] relief." *Singleton* v. *Wulff*, 428 U.S. 106, 124 n.3 (1976) (Powell, J., concurring in part and dissenting in part).

Plaintiffs attempt to distinguish the many decisions of this Court that have denied standing to persons alleging similarly generalized and attenuated injuries, by noting that those cases concerned "a broadly applicable government policy" and were not brought against a private defendant. See *Brief For Respondents* 50. That distinction is not persuasive because the nature of an injury cannot depend upon the identity of the defendant. The injury alleged—being denied the benefits of living in an integrated society—is equally generalized, whether the defendant is a private real estate firm charged with racial steering or a municipality charged with purposely excluding minorities and persons of low income. *Warth* v. *Seldin*, 422 U.S. 490, 512-14 (1975).

That private parties are defendants does not make the causal connection between the challenged conduct and the alleged injury any less attenuated. The Lawyers' Committee attempts to distinguish *Warth* on the ground that the claims of the plaintiffs herein "are based on experiences *personal to them*, not upon the presumed effect of petitioners' conduct toward others." *Brief For Lawyers' Committee* 8 (emphasis in original). This distinction is both incorrect and wholly irrelevant to the question of standing. First, the distinction must fail because the allegation of discrimination in *Warth* was presumed to be true. *Warth, supra*, 502. Moreover, plaintiffs' claim of discrimination goes to the merits of the lawsuit, and it has no bearing on the standing inquiry, which concerns itself with the quality of the injury alleged. In this respect, *Warth* is indistinguishable. The injury alleged herein is based upon the alleged racial steering of prospective homeseekers and thus wholly depends upon "the presumed effect of [this] conduct toward others." The injury alleged in *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), is also indistinguishable because plaintiffs herein have alleged "that defendants' actions encouraged *others* to make decisions about the [location of housing] which directly affected plaintiffs." *Brief For Lawyers' Committee* 9 (emphasis in original). The Court's prior decisions therefore demonstrate that plaintiffs have failed to meet the requirements of Article III.

CONCLUSION

For all of the reasons stated herein and in defendants' opening brief, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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